No. 643

In the Supreme Court
of the United States

OCTOBER TERM, 1968

MARTIN RENE FRAZIER, *Petitioner,*

v.

H. C. CUPP, Warden, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

ROBERT Y. THORNTON
Attorney General of Oregon
DAVID H. BLUNT
Assistant Attorney General
State Office Building
Salem, Oregon 97310
Counsel for Respondent

ROGER ROOK
District Attorney for
Clackamas County, Oregon
THOMAS H. DENNEY
Deputy District Attorney
Clackamas County Courthouse
Oregon City, Oregon 97045
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-68

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Respondent believes that the questions formulated by petitioner are not fairly and accurately stated in the terms and circumstances of this case. Respondent would state the questions presented as follows:

1. Is the Sixth Amendment right to confront and cross-examine witnesses denied when the prosecutor in a criminal trial sets forth the expected testimony of a co-defendant in his opening statement, in a good-

faith belief that the co-defendant will testify for the prosecution, and the co-defendant subsequently refuses to testify?

2. Was the statement of a defendant admissible into evidence in a 1965 (pre-*Miranda*) trial when the statement was obtained as a result of in-custody interrogation, after defendant was advised that he had a right to an attorney and that any statement which he made could be used against him, and when defendant continued to answer questions after once speaking of getting a lawyer before he talked any more?

3. Is the Fourth Amendment prohibition against unreasonable searches and seizures violated by the seizure of a defendant's duffel bag and its contents, when the duffel bag also contains property of defendant's co-indictee, is situated on premises shared by defendant and the co-indictee, and is opened with the permission of the co-indictee?

STATEMENT

I. In General

Respondent cannot accept petitioner's statement of the case without substantial additions and corrections. Petitioner's statement is argumentative and fails to give an accurate picture of the case, inasmuch as matters favorable to petitioner are given undue emphasis, while less favorable facts are minimized or ignored. Respondent's additions and corrections are stated below.

II. Background of the Murder Trial

The synopsis of Frazier's prior life and his relationship to his mother is of questionable materiality to the issues before this Court.

Similarly, the psychiatric evidence adduced on behalf of Frazier in the state trial court is of little materiality here. Moreover, as petitioner points out, there was psychiatric testimony introduced by both sides in the trial of the case. That testimony was conflicting, and the conflict was for the jury to resolve.

What petitioner dismisses merely as "circumstantial evidence" against him requires fuller description. An automobile belonging to Marleau, the victim of the murder, was found at the scene of the crime (Tr. 303, 608).[1] There was blood in and around the car (Tr. 300). In the car were fingerprints subsequently identified as those of Frazier and Jerry Rawls, Frazier's co-indictee (Tr. 688-70). Part of a key to an automobile just traded in by Marleau was found in the car (Tr. 605-06). The other part of this key was later found in a duffel bag containing the clothes worn by Frazier and Rawls on the night in question (Tr. 716, 719). Frazier's clothes were blood-stained (Tr. 717-27). A cigarette lighter of the type owned by Marleau was found in Frazier's pants pocket (Tr. 405, 408, 449, 456, 600, 628-29).

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[1] Throughout this brief, "A" refers to the printed appendix. "Sp. Tr." refers to the one-volume transcript of the hearing on a motion to suppress certain evidence held prior to Frazier's Oregon trial, Exhibit 1 in these proceedings. "Tr.." refers to the six-volume transcript of Frazier's Oregon trial, Exhibit 2 in these proceedings.

Several witnesses saw Marleau in a tavern on the night of the murder with Frazier and Rawls (Tr. 458-60, 593-94). Later that night, two witnesses saw Frazier and Rawls alone on foot on the road between the tavern and the point where Marleau's body was found (Tr. 389, 394). Still later, one of these saw Frazier and Rawls making a telephone call from a pay telephone booth adjacent to a service station (Tr. 396). Examination of the telephone booth and of two dimes in the telephone coin box revealed the presence of blood (Tr. 439, 446, 727-28). Examination of the service station rest rooms the next morning revealed what appeared to be blood stains and paper towels with pinkish stains (Tr. 421, 590-91).

A cab driver testified that he picked up Frazier and Rawls at the service station and took them to a point near the house where they were staying (Tr. 368-69). His dispatcher corroborated this (Tr. 623).

Some weeks after Frazier and Rawls were arrested, two boys, one of them a relative of Marleau, found various papers belonging to Marleau on a pathway leading from the place where the cab driver left Frazier and Rawls to the place where they were staying (Tr. 412, 424). One of the papers had been executed on the night of the murder (Tr. 412-14, 424-25, 687).

The state's "witness who had heard someone call out for help" at the time and place of the crime in fact testified that she had heard several loud voices and many sounds of someone being hit and that the

sounds continued for about fifteen minutes (Tr. 586-87).

III. Prosecution's Reference to Co-indictee's Expected Testimony

To petitioner's narrative of the circumstances surrounding the calling of Rawls to the stand, it should be added that between the district attorney's opening statement and his calling of Rawls as a witness, there was no allusion to his expected testimony in the presence of the jury. Nor was any such allusion made at any time after Rawls invoked the Fifth Amendment.

Petitioner's summary of the hearing in chambers immediately after Rawls had refused to testify is inadequate. In that hearing, the district attorney testified as to the information he had received as to whether or not Rawls would testify against Frazier. He stated that after he had received information from Rawls' attorney that Rawls might refuse to testify, he had inquired into the matter. He had thereafter been informed by one of the sheriff's officers who had subsequently talked to Rawls, by a probation officer, and by at least two of Rawls' relatives, who had also talked to Rawls, that Rawls would testify; and it was on the basis of this later information that he had included Rawls' expected testimony in his opening statement (Tr. 580-81; A. 82).

Contrary to petitioner's assertion, the court of appeals did not conclude that there was "not sufficient evidence that the prosecutor acted in bad faith." While

it recognized that the state trial judge was in the best position to assess the good faith of the prosecutor and the prejudicial effect of his statement (A. 16), the court of appeals also concluded that the prosecutor acted "in a good faith expectation that Rawls would testify." (A. 18).

This Court may wish to note in passing that after Rawls' conviction was reversed, he was retried and again convicted of second degree murder. A second appeal to the Oregon supreme court is pending at this writing.

IV. Admission of Frazier's Written Statement

It should be noted that the police questioning of Frazier lasted only about one hour, between five and six o'clock on the afternoon he was taken into custody. He had been taken into custody about forty-five minutes before the questioning began (Tr. 469-71, 521).

Petitioner's assertion that the police "stated that Frazier could eat as soon as he told them what had happened" is a distortion of the words of the officer. The officer said: "We would like to wrap this thing up, so to speak, and get you over there where you can get something to eat and get some rest" (Tr. 492; A. 59).

It should also be noted that when the typewritten version of Frazier's statement was prepared, he was advised to read the statement carefully. Frazier signed the statement after reading it for approximately ten minutes (Tr. 523).

V. Search and Seizure of Contents of Frazier's Bag

To petitioner's recital of the facts pertaining to the search and seizure of Frazier's bag, respondent would add only that the bag did not bear Frazier's name (Sp. Tr. 23).

SUMMARY OF ARGUMENT

I

The present case does not involve testimony, or the equivalent in the jury's mind of testimony, as to the confession of a co-defendant. *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), are therefore not controlling here.

In Frazier's Oregon trial the district attorney told the jury in his opening statement what he expected the testimony of Jerry Rawls, Frazier's co-indictee, to be. In so doing, he paraphrased the contents of a statement previously given to the police by Rawls. He did not state to the jury that Rawls had confessed to the murder or indicate that he was then putting Rawls' statement before them.

Under these circumstances, the district attorney's remarks should not be regarded as the equivalent in the jury's mind of testimony by a co-defendant, but only as a statement of what the district attorney intended to prove. The jury was instructed that the statements of counsel are not evidence.

The Confrontation Clause of the Sixth Amendment should not be extended to include the statements

and arguments of counsel. Adequate standards already exist for judging the conduct of counsel in criminal cases: the good faith of counsel and the likelihood of unfair prejudice to the defendant. In this case, these tests are satisfied.

Prior to making his opening statement, the district attorney had inquired into whether or not Rawls would testify against Frazier; and according to the best information available to him when he made his opening statement, Rawls was willing to testify. Accordingly, the court of appeals correctly held that the district attorney acted in good faith.

Rawls was on the witness stand only momentarily, and neither before nor after he invoked the Fifth Amendment was there any further reference to his expected testimony in the presence of the jury. The trial was a lengthy one; and much evidence implicating Frazier was presented. Accordingly, the court of appeals properly agreed with the state trial judge that there was no unfair prejudice to Frazier.

II

This 1965 trial involves a relatively brief interrogation of a criminal defendant shortly after he was taken into custody. Early in the interrogation, and before he had made any statement of significance, Frazier was advised that he had a right to counsel and that anything he said could be used against him. He once spoke vaguely of getting a lawyer, but he made no further reference to the subject. After hearing a tape recording of the entire interrogation, the

state trial judge concluded that Frazier's remark, in the context in which it was made, was not to be interpreted as a request for counsel. Under these circumstances, Frazier's written statement was properly held admissible into evidence.

Moreover, Frazier took the stand in his own defense, and his testimony was substantially identical to the matters contained in his written statement. In view of the other evidence putting Frazier at the scene of the crime and implicating him in the murder, it seems clear that his testimony was not impelled by the admission of his statement. He thus should be held to have waived his objection to its admission.

III

Frazier's duffel bag was situated on premises occupied jointly by him and his co-indictee, Jerry Rawls. It contained the clothing worn by both Frazier and Rawls on the night of the murder. Rawls apparently had Frazier's permission to use the bag. It was taken into custody by the police in connection with Rawls' arrest and with the consent of Rawls and other occupants of the premises.

Under these circumstances, Rawls could validly consent to the taking and opening of the bag by the police, at least for the purpose of obtaining his own clothing. And once the bag was lawfully opened, the police were entitled to seize any other property which they observed and which would constitute evidence of the crime under investigation.

The search and seizure in this case was therefore

reasonable. Frazier's argument to the contrary is based on cases involving an exclusiveness of occupancy and possession which is absent here.

ARGUMENT

I

Frazier was not denied the right to confront and cross-examine his co-indictee, Jerry Rawls, when the district attorney told the jury in his opening statement what he expected Rawls' testimony to be, in a reasonable and good-faith belief that Rawls would testify.

Frazier asks this Court to apply the reasoning of *Douglas* v. *Alabama*, 380 U.S. 415 (1965), and *Bruton* v. *United States*, 391 U.S. 123 (1968), to the opening statement made by the district attorney in his 1965 trial. Such an extension of the reasoning of those cases would be greater than is warranted by any prior decision, state or Federal; and it is not warranted under the circumstances of the present case.

In *Douglas*, the state called as a witness a co-defendant who claimed the privilege against self-incrimination and refused to testify. However, the prosecutor continued to question the witness, using a document subsequently identified as a written confession made and signed by him. The prosecutor read from the document, pausing after every few sentences to ask "Did you make that statement?" The witness invoked the privilege against self-incrimination to each of twenty-one such questions.

This Court held that, under these circumstances,

the conduct of the prosecutor constituted a denial of defendant's right of cross-examination as secured by the Sixth and Fourteenth Amendments. The Court noted that, by questioning the witness at length about an alleged statement and causing the witness repeatedly to invoke the privilege against self-incrimination in the presence of the jury, the prosecutor apparently sought to create the impression not only that the witness had made a statement, but also that it was true. The Court pointed out that, while the matter put before the jury was not technically testimony, it was near enough to it to require a reversal of defendant's conviction. The Court said:

> Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. 380 U.S. at 419.

But this is not the situation in the present case, which, it may be noted parenthetically, was tried prior to this Court's decision in *Douglas*. Here, the district attorney, unlike the prosecutor in *Douglas*, did not tell the jury that he had a statement from the co-defendant or indicate that he was then putting that statement before them (Tr. 734; A. 89). He merely set forth in a lengthy opening statement the expected testimony of defendant's co-indictee, among other witnesses. The jury was instructed that the statements of

counsel are not evidence (Tr. 995; A: 95-96). Neither the state trial judge, who was in the best position to assess the effect of the district attorney's remarks, nor the Oregon supreme court, nor the court of appeals regarded those remarks as a putting of Rawls' confession before the jury, either directly or indirectly, but only as a summary of expected testimony. Under these circumstances, the district attorney's remarks should not be regarded as "the equivalent in the jury's mind of testimony."

In *Bruton* v. *United States*, 391 U.S. 123 (1968), a postal inspector testified during a joint trial as to a confession made by a co-defendant which implicated Bruton. Such an out-of-court statement is, of course, hearsay as to persons other than the declarant; and the trial court instructed the jury that the statement in question was not to be considered against Bruton. This Court held that, under the circumstances of that case, the possibility that the jury might be unable or unwilling to follow such an instruction was so great as to require reversal.

However, *Bruton* is readily distinguishable from the present case. Here the Court is not concerned with a joint trial, but with the separate trial of one of two persons jointly indicted for murder. The Court is not concerned with a co-defendant's confession presented as such to the jury, but merely with a paraphrase of the content of such a confession in the district attorney's opening statement. Consequently, the Court is not concerned with the problem of whether or not a

jury can and will follow an instruction that they may consider evidence against one defendant and must disregard it as to another, but with the problem of whether or not a jury can and will follow an instruction that the statements of counsel are not evidence. For these reasons, as well as those already stated in the discussion of *Douglas* v. *Alabama* above, *Bruton* is not in point here.

Moreover, this Court has held that *Bruton* applies retroactively in state and Federal trials. *Roberts* v. *Russell*, 392 U.S. 293 (1968). It is not the purpose of this argument to suggest any disagreement with the Court's holding in *Bruton*, or with *Bruton's* retroactive application to cases which present the same fact situation. Nevertheless, the very fact that *Bruton* does apply retroactively suggests that this Court should be cautious in extending its principles to cases which present different facts.

In holding that the constitutional principles established in other cases do not apply retroactively, this Court has frequently recognized the prevailing importance of such factors as the reliance by law enforcement authorities on the previously existing standards and the effect upon the administration of justice of a retroactive application of the new standards. See, *e.g.*, *De Stefano* v. *Woods*, 392 U.S. 631 (1968); *Stovall* v. *Denno*, 388 U.S. 293, 296-301 (1967). The same factors argue, with at least equal persuasiveness, against expanding beyond its original scope a rule already determined to apply retroactively, as Frazier seeks to do here.

Thus, Frazier's argument that the Confrontation Clause of the Sixth Amendment is violated whenever the substance of an accomplice's confession is placed before the jury under any circumstances whatever is an overstatement of this Court's holdings in *Douglas* and *Bruton*. The reasoning behind those decisions is of considerably less force in the present case. The possibility of a jury being improperly prejudiced by the substance of the confession of a co-defendant is greatly diminished where, as here, there is no explicit reference to a confession, the prosecutor merely says in his opening statement what he expects the testimony of the co-defendant to be, and the jury is instructed that the statements of counsel are not evidence. Indeed, the precise reasoning of *Douglas* and *Bruton* is of so little force in the present situation that there appears to be no reported case, state or Federal, which has ever applied the Confrontation Clause to the statements or arguments of counsel. The two other cases relied on by Frazier, *Robbins* v. *Small*, 371 F.2d 793 (1st Cir. 1967), and *United States ex rel. Hill* v. *Deegan*, 268 F. Supp. 580 (S.D. N.Y. 1967), are practically "on all fours" with *Douglas* and *Bruton* respectively; but for that very reason, they add nothing to the principles established by this Court in those cases.

It is, of course, improper for a prosecutor to set forth matter in his opening statement which he knows, or reasonably should know, he cannot substantiate by competent evidence. But this is a matter for the courts to judge on the basis of the good faith of the prose-

cutor. The record in this case shows that, according to the best information available to the district attorney at the time he made his opening statement, Rawls was willing to testify against Frazier (Tr. 580-81; A. 80-83); and the district attorney naturally expected him to testify in accordance with his prior statement. Accordingly, the court of appeals properly concluded that the district attorney acted in good faith here. See also *State* v. *Frazier*, 245 Or. 4, 8-9, 418 P.2d 841, 843 (1966).

In some cases, regardless of the prosecutor's good faith, the fact that matter set forth in an opening statement is not competently proved could be sufficiently prejudicial that the failure of the trial court to grant a mistrial would constitute a violation of due process. Indeed, it was as a denial of due process that Frazier's objection to the district attorney's opening statement was originally presented in the Oregon courts (see, *e.g.*, Tr. 582-84; A. 83-84) and in the Federal district court (A. 4). But this is a matter for the courts to judge on the basis of the degree of prejudice involved. And in this case, the state trial court and the court of appeals properly concluded that there was no prejudice sufficient to require a mistrial, considering that there was only one reference to Rawls' expected testimony in the course of a lengthy trial, that Rawls was on the witness stand only briefly, that there was considerable other evidence against Frazier, and that the jury was properly instructed not to consider the remarks of counsel as evidence.

Thus, standards already exist for judging the re-

marks of counsel in criminal trials: the good faith of counsel and the likelihood of unfair prejudice to the defendant. *Cf. Namet* v. *United States*, 373 U.S. 179, 186-87 (1963). There is no need to expand the Confrontation Clause to the extent urged by Frazier, merely because courts below have held that the reference to Rawls' expected testimony in the context of Frazier's trial did not require reversal by those standards.

To expand the Confrontation Clause to the extent urged by Frazier would do violence to the meaning of the Constitutional phrase, "the witnesses against him." It would obscure the distinction between statements of counsel and evidence. It would make the prosecutor act at his peril in stating to the jury what he expects any witness' testimony to be, since any witness may unexpectedly die, prove unavailable, or claim a privilege not to testify. And it is simply not necessary, since adequate standards already exist to prevent criminal defendants from being prejudiced by improper statements of counsel, when such improprieties in fact occur.

II

The admission into evidence of Frazier's confession violated none of his constitutional rights.

In this 1965 case, the police and the trial court had to follow and apply the standards pronounced by this Court only a few months before Frazier's arrest and trial, in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). The stricter standards of *Miranda* v. *Arizona*, 384

U.S. 436 (1966), are not applicable. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

The case involves a relatively short interrogation of a defendant about forty-five minutes after he was taken into custody on September 24, 1964, and immediately upon his arrival at police headquarters (Tr. 469-71). The tape recording of the police questioning shows that Frazier was advised that he had a right to counsel and that any statement he made could be used against him. This advice was given before Frazier made any of the damaging admissions contained in his written statement, and he stated that he understood those rights (Tr. 488; A. 57). Moreover, the written statement itself contains an acknowledgment that Frazier understood and waived his constitutional rights, and Frazier read the statement carefully before signing it (Tr. 523). It is true that during the questioning Frazier once spoke vaguely of getting a lawyer, but he made no further reference to the subject (Tr. 524). And after hearing the recorded interrogation, the trial court held that this ambiguous statement, in the context in which it was made, was not to be interpreted as a request for counsel (Tr. 737; A. 91). Under these circumstances, it is submitted that the trial court properly held that Frazier's written statement was admissible into evidence.

Moreover, it should not be necessary for this Court to pass upon the admissibility, by *Escobedo* standards, of Frazier's written statement. In his trial, Frazier took the witness stand in his own behalf, gave substantially identical testimony, and admitted that the

statement was essentially true. For this reason the Oregon supreme court held that Frazier had waived his objections to the admissibility of his written statement. *State* v. *Frazier*, 245 Or. 4, 9, 418 P.2d 841, 843-44 (1966).

The Oregon court's holding was in accord with numerous other jurisdictions which have recognized that, in very limited circumstances, a defendant may waive the constitutional objections to the admission of his prior statements by taking the witness stand and repeating the substance of those statements. See, *e.g.*, *Bell* v. *People*, 158 Colo. 146, 406 P.2d 681, 684 (1965), cert. den. 384 U.S. 1024 (1966); *People* v. *Skidmore*, 69 Ill. App. 2d 483, 217 N.E.2d 431, 433 (1966); *Commonwealth* v. *Chase*, 350 Mass. 738, 217 N.E.2d 195, 198, cert. den. 385 U.S. 906 (1966); *State* v. *Woodards*, 6 Ohio St. 2d 14, 215 N.E.2d 568, 574, cert. den. 385 U.S. 930 (1966); *State* v. *Freeman*, 232 Or. 267, 279, 374 P.2d 453, 459 (1962), cert. den. 373 U.S. 919 (1963); *Commonwealth ex rel. Edowski* v. *Maroney*, 423 Pa. 229, 223 A.2d 749, 752 (1966); *Lester* v. *State*, 216 Tenn. 615, 393 S.W.2d 288, 292 (1965), cert. den. 383 U.S. 952 (1966).

These cases make it clear that this rule is a narrow one. It applies only when four conditions are met: (1) the defendant must be represented by competent counsel; (2) his testimony on direct examination must be substantially identical with the statements allegedly obtained in violation of his constitutional rights; (3) his testimony must not tend to deny, minimize,

or explain away his prior statements; and (4) he must not be forced to take the stand as a result of the admission of his prior statements. It seems clear that the first three conditions are satisfied here; and, as will be shown in the next two paragraphs, so is the fourth.

While the principles stated by this Court in *Harrison* v. *United States*, 392 U.S. 219 (1968), limit the possibility of a valid waiver of constitutional objections, it would seem that, unlike Harrison, Frazier's trial testimony was not impelled by the use of his written statement. In the present case, defense counsel seem to have put Frazier on the stand largely to have him testify as to his general background and to give the jury a basis for evaluating the psychiatric testimony concerning him which was later introduced. More significantly, the other evidence putting Frazier at the scene of the crime and implicating him in the murder was substantial. He had been seen with the deceased earlier in the evening, he was seen near the scene of the crime around the time of its commission, his fingerprints were found in the deceased's car, his clothes were blood-stained, and some of the deceased's personal effects were found both in Frazier's travel bag and along the route apparently used by Frazier and Rawls when they returned home.

With this evidence already before the jury, it is logical to infer that Frazier and his counsel would desire to present testimony that, while Frazier was present at the commission of the crime, he was not the

actual strangler. And this is essentially all that his written statement says. Under these circumstances, the logic of *Harrison* should not be controlling here.

III

The search and seizure of Frazier's duffel bag and its contents was reasonable, since it was situated on premises occupied jointly by Frazier and his co-indictee, contained the clothing of both Frazier and the co-indictee, and was taken in connection with the arrest of the co-indictee and with the permission of the co-indictee and other occupants of the premises.

The facts pertaining to the search and seizure of Frazier's bag are not in dispute. Frazier was staying temporarily in the home of his aunt (Tr. 779-80). Immediately prior to its seizure, his bag was situated in a bedroom which Frazier and his co-indictee, Jerry Rawls, were sharing (Sp. Tr. 26; Tr. 616, 632-33). The bag did not bear Frazier's name (Sp. Tr. 23). At the time of its seizure, the bag contained clothing belonging to Rawls, at least most of which was contained within one of the bag's three compartments (Sp. Tr. 23, 38-39).

The police acquired the bag at the time of Rawls' arrest and in connection with his arrest, though not incident thereto in the legal sense. At the time of his arrest, Rawls consented to the taking of his own clothing and indicated that it was in the bag in question (Sp. Tr. 20; A. 25-26). Rawls' mother, one of the occupants of the house, consented to the taking of the bag (*Ibid.*). After the police opened the bag and ascertained that it did in fact contain Rawls'

clothing, they again asked and received permission from the occupants of the house to take the bag with them (*Ibid.*). A more detailed examination of the contents of the bag, at some time after it was taken, produced evidence used against Frazier, notably his blood-stained clothing and the broken half of a car key belonging to the murder victim (Sp. Tr. 38-39; Tr. 714-16).

Frazier contends that the search of his bag under these circumstances violated his Fourth Amendment rights, since he did not consent to the search and the police did not obtain a warrant to search the bag after taking custody of it. But the reasonableness of a search and seizure depends upon the peculiar facts and circumstances of each case. *Cooper* v. *California*, 386 U.S. 58, 59 (1967); *Harris* v. *United States*, 331 U.S. 145, 150 (1947). And in this case, the facts disclose nothing unreasonable about the actions of the police.

Frazier does not deny that Rawls consented at the time of his arrest to give the police the clothing which he, Rawls, wore on the night of the murder. He does not deny that Rawls' clothing was contained in his bag. He does not deny that the bag bore no external evidence of ownership. He does not deny that the bag was situated in a part of the premises which was not exclusively his. And he does not deny that the police took custody of the bag with the permission of other occupants of the residence, whose right to use the part of the premises where the bag was situated was at least equal to his.

It would seem, then, that Frazier admits that the police did have a valid consent to take custody of his bag and that, at least to this extent, the search and seizure in this case was proper. In any event, it seems clearly settled that where multiple ownership or occupancy of premises exists, any one owner or occupant may permit a search without a warrant; and if incriminating evidence is found, it may be used against all. See, *e.g.*, *Wright* v. *United States*, 389 F.2d 996, 998 (8th Cir. 1968); *Nelson* v. *California*, 346 F.2d 73, 77 (9th Cir. 1965); *United States* v. *Sferas*, 210 F.2d 69, 74 (7th Cir.), cert. den. 347 U.S. 935 (1954); 1 Varon, Searches, Seizures & Immunities 443-44 (1961); 4 Wharton, Criminal Law & Procedure § 1579 (Anderson ed. 1957).

Indeed, Frazier has never contended that the taking of the bag was improper, but only that the subsequent search of the bag and seizure of its contents violated his constitutional rights (See Tr. 735-36; A. 90). However, this argument is untenable under the facts of this case.

Frazier admits that the bag contained clothing belonging to Rawls which Rawls consented to give the police at the time of his arrest. He does not contend, and never has contended that Rawls' use of the bag was without his permission. In the absence of such a contention, the courts below have properly concluded that Rawls did have Frazier's permission to use the bag. And if Rawls had permission to use the bag for the purpose of secreting his clothing, it seems

clear that he could properly consent to a search of the bag, at least for the purpose of retrieving his own clothing. The rule here should be no different from the rule regarding jointly occupied premises cited above.

It seems clear from the record of this case that the police obtained and searched the bag for the purpose of retrieving Rawls' clothing. And once they had opened the bag lawfully, they were entitled to seize any other property, such as Frazier's bloodstained clothing, which was in plain sight, *Harris* v. *United States*, 390 U.S. 234, 236 (1968), and which would constitute evidence of the crime under investigation. *Warden, Maryland Penitentiary* v. *Hayden*, 387 U.S. 294, 300-01 (1967).

An additional and alternative basis for upholding the search of Frazier's bag may be derived by comparing the facts of the present case with those of *Cooper* v. *California*, 386 U.S. 58 (1967). Assuming, as seems to be conceded, and as is established by the facts of this case in any event, that the police had lawfully obtained custody of the bag, it would seem that they were entitled to search it under the rationale of *Cooper*. Here, as in *Cooper*, the search in question was of a readily movable piece of personal property, even though Frazier's bag, unlike Cooper's automobile, was not capable of moving under its own power. And here, as in *Cooper*, the reason for and nature of the police custody of the thing searched would seem to justify the search. The police seized Frazier's

bag, as Cooper's car was seized, because of the crime for which the arrest was made. Their subsequent search of the bag, like the search of Cooper's car, was closely related to the reason for the arrest and to the reason the bag was retained. The fact that the search in this case was made in connection with the arrest of Frazier's co-indictee, rather than that of Frazier, should not be material where the co-indictee was using Frazier's bag, apparently with Frazier's permission, where there was no exterior indication of who actually owned the bag, and where the bag was situated on premises occupied by both.

The cases cited by Frazier are not in point here. Two of them presented situations in which the person giving the consent to search was clearly in no position to do so. In *Stoner* v. *California*, 376 U.S. 483 (1964), this Court held that a hotel clerk could not authorize the search of a guest's room. In *People* v. *Miller*, — Ill —, 238 N.E.2d 407 (1968), the Illinois supreme court held that the owner of premises on which an automobile was situated could not authorize the search of the automobile, when it did not belong to him and when he had no other connection with it.

The third case cited by Frazier, *Reeves* v. *Warden, Maryland Penitentiary*, 346 F.2d 915 (4th Cir. 1965), involved an exclusiveness of occupancy which is absent here. *Reeves* held only that one tenant or guest in a private residence could not authorize the search of a room and a bureau used exclusively by another tenant or guest. It was conceded in that case that

the room was used exclusively by the accused, and the trial court found that the bureau was also set aside for his exclusive use. 346 F.2d at 924. But such is not the case here. And in the nearly contemporaneous case of *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965), the same court which decided *Reeves* upheld the search of a suitcase, consented to by a third person under circumstances much more similar to those in the present case.

The present case does not depend upon the fictitious "apparent authority" relied upon in *Stoner* and *Miller*. Nor does it involve premises or property used exclusively by the person against whom the evidence in question was introduced, as in *Reeves*. And these cases should not be used, as Frazier seeks to do here, to establish a rule that evidence taken with the permission of one of several occupants of premises or property can never be used against one who did not personally consent to the taking.

Frazier also contends that the courts below should have required the police to obtain a warrant prior to searching the bag, because it was in police custody and there was no urgent or other reason for a search of its contents without a warrant. But it seems clear that it is not enough to show that the police could have obtained a search warrant. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. *Cooper* v. *California*, 386 U.S. 58, 62 (1967); *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950).

For these reasons, the courts below properly rejected Frazier's search and seizure arguments. The Oregon supreme court appropriately summarized the matter in *State* v. *Frazier*, 245 Or. 4, 8, 418 P.2d 841, 843 (1966):

> In this case, the officer acted with the consent of Rawls, who, so far as the record discloses, was authorized to use the bag for the storage of his own clothing. Only unreasonable searches and seizures come within the interdict of the Fourth Amendment, and what is reasonable depends upon the facts and circumstances of each case. . . .
>
> When, as in this case, the officers acted on the authority of the apparent owner and established user of the bag, it cannot be contended that the constitutional rights of the defendant against unreasonable search and seizure were invaded simply upon the ground that it later appears that the defendant was the owner of the bag and some of the clothing therein.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States Court of Appeals should be affirmed.

ROBERT Y. THORNTON
Attorney General of Oregon

DAVID H. BLUNT
Assistant Attorney General
Counsel for Respondent

ROGER ROOK
District Attorney for
Clackamas County, Oregon
THOMAS H. DENNEY
Deputy District Attorney
Of Counsel

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